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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

GLENN ELLIOTT RITCHIE,

Defendant and Appellant.

F077983

(Super. Ct. No. 17CM2860)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kings County. Steven D. Barnes, Judge.

Cynthia Lee Barnes, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Eric L. Christoffersen, and Ward A. Campbell, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Detjen, Acting P.J., Smith, J., and Snauffer, J.

STATEMENT OF THE CASE

A complaint filed on August 10, 2017 charged appellant, Glenn Elliott Ritchie, with first degree burglary (Pen. Code, § 459;¹ count 1), use and being under the influence of methamphetamine (Health & Saf. Code, § 11550, subd. (a); counts 2, 6, 7), possession of drug paraphernalia (Health & Saf. Code, § 11364, subd. (a); count 3), concealing stolen property (§ 496, subd. (a); count 4), false imprisonment (§ 236; count 5), fraudulent use of access card (§ 484g, subd. (a); count 8), violated restraining order (§ 273.6, subd. (a); count 9), and unlawful use of force and violence (§ 242, count 10). The only felony charge was count 1.

In conjunction with count 1, it was further alleged that Ritchie violated section 462, subdivision (a). Also, it was alleged that count 1 was a violent felony within the meaning of section 667.5, subdivision (c), and that Ritchie had suffered two prior felony convictions within the meaning of section 1170.12, subdivision (a) and four prior felony convictions within the meaning of section 667.5, subdivision (b).

On November 21, 2017, Ritchie entered pleas of guilty to count 1, 4, 5, 8, and 10. All other allegations and counts were stricken or dismissed. That same day, the court granted Ritchie probation as to count 1.

On March 21, 2018, the Kings County Probation Department filed a report that Ritchie had violated probation.

On June 4, 2018, Ritchie admitted the probation violation.

At the July 3, 2018, sentencing hearing, the court terminated Ritchie's probation and sentenced him to state prison for the middle term of four years.

Ritchie filed a timely notice of appeal on August 22, 2018.

¹ Undesignated statutory references are to the Penal Code.

STATEMENT OF FACTS

Ritchie admitted he violated the terms of his felony probation by failing to report to the probation department after his release from the Adventist Medical Center and failing to report back to the live-in treatment he had been attending.

DISCUSSION

California Rules of Court, rule 4.435, subdivision (b)(1), states that when a court revokes probation and imposes a prison sentence, it cannot consider events subsequent to the time probation was granted in determining the length of the sentence. Ritchie contends the trial court erroneously considered his post probation behavior when it sentenced him to prison. Respondent contends Ritchie forfeited this claim by failing to object, the record does not support his argument, and, in any event, he was not prejudiced.

A. The Record Below

The trial court apprised the parties of its intended sentence so that they would have a “meaningful opportunity” to object. (*People v. Scott* (1994) 9 Cal.4th 331, 356 (*Scott*).) The court announced that it did not intend to reinstate Ritchie on probation, noting “that this case in and of itself is a case where he really shouldn’t have received probation in the first instance” The court then cited two reasons for its statement: (1) Ritchie had committed a first degree burglary “and he wouldn’t otherwise be eligible” and (2) he had two or more prior felony convictions. The court surmised that prior allegations had been dismissed as part of Ritchie’s earlier plea bargain in order to preserve his probation eligibility. The court made no reference to Ritchie’s behavior while on probation.

The court then noted Ritchie, as a probationer, was supposed to be in a live-in program, but he had not returned to the program. Also, Ritchie had been given several opportunities on probation. The court explicitly disclosed that “[b]ased upon his [Ritchie’s] conduct since the probation was granted, it’s the Court’s inclination not to reinstate him on probation.”

As to Ritchie's sentence, the court noted his criminal record "stretches back to 1990: a couple of robberies, some drug offenses." Ritchie was "no stranger to the criminal justice system." On the other hand, the court credited Ritchie with admitting his guilt at an early state of the process. The court's indicated sentence was the middle term of four years in state prison.

Ritchie then explained the circumstances of his probation violation. The court was politely skeptical about Ritchie's attempt to characterize his violation "as a sort of technicality...." Then, defense counsel began discussing the circumstances of Ritchie's original crime, the first degree burglary. The court cut off a discussion of the crime, interjecting "What's relevant today is what he did since I put him on probation."

Defense counsel then switched gears and argued the court should only impose the mitigated sentence since Ritchie had not committed any other crimes. The prosecutor argued that Ritchie's "extensive criminal record" justified an upper term.²

The court then sentenced Ritchie to the middle term of four years in state prison "for the reasons indicated...."

B. Forfeiture

Ritchie argues the sentencing court improperly relied on his post-probation behavior when it imposed a middle term state sentence. As he acknowledges, his counsel did not object. Accordingly, he has forfeited this contention. (*Scott, supra*, 9 Cal.4th at p. 356.)

Ritchie criticizes his counsel, but ineffective of assistance claims cannot be decided on appeal unless there can simply be no explanation for counsel's omission. (*People v. Thomas* (2017) 15 Cal.App.5th 1063, 1075.) In this case, there is such an explanation. Defense counsel tried to argue his client's post-probation behavior justified a lower term. Given the dearth of mitigating circumstances, it was not to Ritchie's

² The probation officer also recommended an upper term. (CT 122.)

advantage for his counsel to object to any consideration of his post-probation behavior by the court. That the tactic failed does not establish ineffectiveness. (*People v. Blomdahl* (1993) 16 Cal.App.4th 1242, 1248.) Ritchie does not suggest what else his counsel should have argued.

Moreover, tactical decisions aside, defense counsel reasonably and, in our view, correctly could have concluded that the court was not relying on Ritchie's post-probation conduct to determine the length of his sentence. The court had not cited his actions while on probation as a reason for imposing the middle term. When the court later dismissed defense counsel's attempt to discuss the circumstances of Ritchie's underlying crime, it was in the context of the court's decision to revoke probation, not determining the length of his sentence for the underlying offense.

Moreover, it is not reasonably probable the outcome would have been different had counsel objected. (*People v. Osband* (1996) 13 Cal.4th 622, 664.) The court indicated that Ritchie probably should not have been granted probation in the first place. It specifically relied on the nature of Ritchie's underlying offense and his criminal record to impose a midterm prison sentence. Ritchie does not suggest any countervailing mitigating evidence. It is not reasonably probable Ritchie's probation violation was a factor in the court's determination that he should serve a middle term.

C. Merits of Ritchie's Claim

Much of what has been said in connection with Ritchie's forfeiture also governs any direct consideration of the merits of his contention. The record simply does not support Ritchie's assertion that the court considered his post-probation behavior in choosing the middle term for his state prison sentence. The court considered his conduct while on probation only to the extent that conduct justified its separate decision to revoke probation. (*People v. White* (1982) 133 Cal.App.3d 677, 681.) The court referred to Ritchie's actions when he was on probation only in the context of revocation and in rejecting any defense arguments opposing revocation.

Moreover, there is no reasonable probability the sentence would have been different as the court made it clear that Ritchie probably should not have been granted probation. Ritchie had pled guilty to burglarizing an inhabited trailer. His criminal record, periodic prison time, and probation/parole violations stretched back almost 20 years. Ritchie's failure to report while on probation made no difference in the court's sentence.

DISPOSITION

The judgment is affirmed.